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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,
Petitioner,
v.
JESUS MORALES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

In an effort to dismiss our submission that there is disagreement in the lower courts over the standard to be applied to loitering and other public order laws, respondents correctly observe that no court has ever considered an ordinance containing precisely the same language found in Chicago's gang loitering ordinance. Of course, the three amicus briefs filed in support of the petition, signed by nearly 20 entities with a focus considerably broader than the workings of the City of Chicago, bear witness to the widespread concern about the decision below. Moreover, respondents cannot fairly dispute that there is a serious disagreement in the lower courts about what standards should be applied to public order laws, and in particular about whether an enactment violates the Due Process Clause merely because it "makes criminal activities which by modern standards are normally innocent." Pet. App.

9a (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)). It is because of this disagreement—and the considerable uncertainty it has engendered in this area of the law—that this case warrants this Court's review.

1. The Morales respondents claim that this Court lacks jurisdiction here "because the decision of the Illinois Supreme Court rested on adequate and independent state grounds." Morales Br. 9. The Morales respondents do not even attempt to square their position with *Michigan v. Long*, 463 U.S. 1032 (1983), and its progeny. *Michigan v. Long* announced a simple rule: when the decision of a state court rests "primarily" on or is "interwoven" with federal law, this Court may exercise jurisdiction unless the opinion of the state court contains a "plain statement" that "clearly and expressly" indicates that its judgment rests on an adequate and independent state ground. *Id.* at 1041. This is true even when a state court relies on state precedents to support its holding, as long as at least "some of those cases relied on an analysis of our cases . . . ." *Pennsylvania v. Labron*, 116 S. Ct. 2485, 2487 (1996) (per curiam). This Court has consistently applied this plain statement rule since it decided *Long*. See Pet. 2 n.1.

The Illinois Supreme Court expressly invoked federal law—and relied primarily on this Court's decisions—in invalidating the gang loitering ordinance. See, *e.g.*, Pet. App. 7a, 17a. There is no plain statement in the opinion below that the court's judgment rests on an adequate and independent state ground. Under *Michigan v. Long*, that is the end of the jurisdictional inquiry. Indeed the holding in *Long* was meant to end precisely the sort of jurisdictional complexity that the Morales respondents urge, which requires this Court to parse the opinion below and search through applicable state law in order to divine whether it, uninfluenced by federal principles, could support the judgment below. See 463 U.S. at 1039-41.[1] It is perhaps for this reason that the Youkhana respondents do not join in this jurisdictional objection.

The Morales respondents' position is all the more unfounded since, in their brief below, respondents brought the holding of *Long* to the court's attention and asked it to make an express statement that any judgment invalidating the gang loitering ordinance rested on an adequate and independent state ground. See Brief of Defendants-Appellees at 9-10 & n.1, *City of Chicago v. Morales*, Nos. 80497, 80485 & 80668 (Ill. Sup. Ct.). The court, however, declined respondents' invitation. Had the state court wished to insulate its judgment from this Court's review, it knew just what to do. Plainly the Illinois Supreme Court intended that this Court be able to correct any error it may have made in assessing applicable federal standards for public order laws.

2. As to the disarray we detail in the lower courts over the standards governing loitering and similar public order laws (see Pet. 14-17), respondents claim that this dis-

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[1] While the Morales respondents ignore *Michigan v. Long*, they do cite *California v. Freeman*, 488 U.S. 1311 (1989), for the proposition that a state court's "decision that [the] defendant's conduct was not within [the] statutory definition of crime furnished [an] adequate and independent state ground for reversing [a] conviction." Morales Br. 9. The Morales respondents do not explain how that proposition reaches this case. Nothing in the Illinois Supreme Court's opinion even hints that respondents were not properly charged or convicted. To the contrary, rather than hold that the defendants before it either were not properly charged with a crime, as the court did in *People v. Nash*, 173 Ill. 2d 423, 672 N.E.2d 1166 (1996), another case the Morales respondents cite, or that any of the respondents had not in fact been proven guilty of violating the gang loitering ordinance, the Illinois Supreme Court squarely held that the gang loitering ordinance "fails to meet constitutional standards for definiteness and clarity" (Pet. App. 17a) and that it "is an arbitrary restriction on personal liberty and, thus, violates substantive due process" (*id.* at 19a).

agreement extends only to ordinances significantly different from ours, and that there is unanimity on the invalidity of ordinances penalizing "mere loitering." See Morales Br. 11; Youkhana Br. 15. Of course, as the Illinois Supreme Court recognized, this ordinance requires more than "mere" loitering; it also requires that the police reasonably believe that a group loitering contain a member of a criminal street gang and disobedience to a police order to move on. *See* Pet. App. 11a-14a. More important, the conflict in the lower courts is not about "mere loitering"; not a single case either side has cited involves a prohibition on loitering without more. Rather, the question on which the lower courts have disagreed is whether a loitering law is invalid if "it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" Pet. App. 9a (citation omitted) (quoting *Papachristou*, 405 U.S. at 163)). In our view, of course, this proposition is inconsistent with the unquestioned power of legislatures to enact prophylactic laws that criminalize conduct that may be innocent in itself, but which is unacceptably likely to give rise to substantive evils within the power of government to prohibit.

There is a square conflict on this point and it lies at the heart of this case as well. Here, the Illinois Supreme Court found Chicago's ordinance to be impermissibly vague and inconsistent with substantive due process because it could be applied to persons engaged in "innocent" activities. See Pet. App. 10a, 17a-18a. Other courts have also invalidated loitering ordinances for this same reason. See, *e.g.*, *People v. C.M.*, 630 P.2d 593, 595-96 (Colo. 1981) (school loitering ordinance invalid because it could reach nondisruptive persons); *City of Akron v. Rowland*, 67 Ohio St. 3d 374, 382-83, 618 N.E.2d 138, 145-46 (1993) (drug loitering statute invalid because it could reach persons innocently standing on streets). But still other courts have rejected this argument, concluding that

as long as an ordinance requires additional conduct that distinguishes an offender from persons who are merely loitering, it should be upheld even if police will occasionally be mistaken about why an individual is loitering. See, *e.g.*, *Bell v. State*, 252 Ga. 267, 271, 313 S.E.2d 678, 681 (1984) (state statute did not reach all loiterers because "the conduct must be that which would alarm a reasonable person that danger exists to person or property"); *People v. Smith*, 44 N.Y.2d 613, 619-20, 378 N.E.2d 1032, 1035, 407 N.Y.S.2d 462, 465-66 (1978) (state statute upheld because "it requires loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution").

If the former view is correct, then so was the decision below. We agree that our ordinance can be applied to gang members and their cohorts even when they are not loitering for the purpose of facilitating criminal street gang activity. If the latter view is correct, however, the gang loitering ordinance readily passes constitutional muster. It does not apply to all loiterers, but only to groups containing persons reasonably believed to be members of criminal street gangs, and even then only if they disobey an order to move on. Thus the disagreement in the lower courts over whether a law's potential to reach nondisruptive loiterers is reason to invalidate it is central to the constitutionality of the gang loitering ordinance.

The Youkhana respondents claim that the varying results that the lower courts have reached on loitering laws can actually be reconciled (an assertion evidently too bold for the Morales respondents to join). See Youkhana Br. 15-16. In fact, the decisions in this area are plainly irreconcilable. We explain at some length in our petition why this is so; for present purposes a few examples should suffice. In *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 439 N.W.2d 562, cert. denied, 493 U.S. 824 (1989), the court detailed the split in authority among courts to consider loitering laws modeled on the Model Penal Code,

which recommends a prohibition on loitering under circumstances that reasonably warrant alarm for the safety of persons or property (see American Law Institute, *Model Penal Code* § 250.6 (1985)), and found "the reasoning of the courts who have approved the Model Penal Code to be more persuasive." 149 Wis. 2d at 445, 439 N.W.2d at 566. Our ordinance, of course, is simply a more precise version of the Model Penal Code model, since it specifies the particular circumstance in which the legislature found that loitering reasonably warrants alarm. As for another popular approach, *City of Akron v. Rowland* invalidated (by 4-3 vote) an ordinance prohibiting loitering for the purpose of engaging in drug-related activity virtually identical to the law upheld in *City of Tacoma v. Luvene*, 118 Wash. 2d 826, 837 P.2d 1374 (1992).[2] The varying results courts have reached on laws prohibiting loitering with criminal intent are also detailed at some length in *People v. Superior Court*, 46 Cal. 4th 381, 398-400, 758 P.2d 1046, 1055-56, 250 Cal. Rptr. 515, 524-25 (1988).[3]

Particularly revealing is the Morales respondents' claim that Chicago need only enact a different type of loitering ordinance to reap the benefits of the proactive and prophylactic law enforcement strategy that such laws facili-

[2] And after our petition was filed, the Louisiana Supreme Court invalidated that state's drug loitering statute, expressly rejecting *Luvene* and following *Rowland*. See *State v. Muschkat*, 1998 WL 91793 (La. March 4, 1998).

[3] Also unpersuasive is respondents' effort to distinguish the holding that an injunction against gang members loitering in public infringed no constitutionally protected interest in *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277, cert. denied *sub nom. Gonzalez v. Gallo*, 117 S. Ct. 2513 (1997), on the ground that the case involved an injunction rather than a generally applicable law. See Morales Br. 11-12; Youkhana Br. 19-20. In fact, injunctions generally call for more rigorous judicial review than generally applicable laws. See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-67 (1994).

tate. See Morales Br. 12-13. In fact, there is no type of loitering or similar ordinance that a state or local government may safely enact. As we explain above and at greater length in our petition, courts have disagreed about the validity of laws modeled on the Model Penal Code, laws requiring loitering with intent to engage in unlawful activity, and even laws forbidding sleeping on the public ways.[4] In her comprehensive review of public order laws, Professor Livingston demonstrates that there is no type of public order law that has received uniform judicial treatment, largely because of the uncertain reach of this Court's holding in *Papachristou*. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L. Rev. 551, 608-34 (1997). Thus it is no wonder that she found the law in this area to be "erratic, fractured, and confusing . . . ." *Id.* at 628.

3. On the vagueness holding below, only the Youkhana respondents attempt to defend the Illinois Supreme Court's approach to the first prong of vagueness doctrine, which "requires a criminal statute to be sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct." Pet. App. 7a (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). They claim that the term "loitering" "is so amorphous that people of ordinary intelligence cannot understand what it prohibits or how to comply with its requirement." Youkhana Br. 6. If this were the case, however, any law that made "loitering" an element of a criminal offense would be invalid because no one could know when they were loitering; yet even respondents do not suggest that all loitering laws are invalid. In fact, courts have frequently held that "loitering" has a common sense meaning that reasonable persons can apprehend. See, *e.g.*, *People v. Superior Court*, 46 Cal. 4th at 390-92, 758 P.2d at 1049-50, 250 Cal. Rptr.

[4] Even juvenile curfew laws provide no safe harbor from attack under the rationale employed below, as the Youkhana respondents note. See Youkhana Br. 18.

at 518-19; *State v. Armstrong*, 282 Minn. 39, 42, 162 N.W.2d 357, 360 (1968).

Even more important, since the only conduct proscribed by the gang loitering ordinance is disobedience to a police order to move on, the ordinance provides unmistakable notice of what is forbidden. Whatever else might be said about a law requiring persons to obey all police orders, it is surely not vague.[5] Under such a law, persons know exactly what is expected of them. The same is true under the gang loitering ordinance.

The second prong of vagueness doctrine is "the requirement that a penal statute must adequately define a criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement." Pet. App. 14a (citing *Kolender*, 461 U.S. at 357-58). Respondents claim that the ordinance confers "standardless" (Morales Br. 13) or "unfettered" (Youkhana Br. 13) discretion on police officers to order persons to move on. The ordinance, however, requires that police officers have a reasonable belief that a group of loiterers contains a member of a criminal street gang. Respondents do not explain how this is any more "standardless" than the "reasonable suspicion" standard of *Terry v. Ohio*, 392 U.S. 1 (1968), which the Court explained could properly be used as a basis to detain loiterers in *Kolender* because it provides "neutral limitations on the conduct of individual officers." 461 U.S. at 361 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). And if "reasonable suspicion" is an appropriately "neutral" limitation on an officer's authority to detain loiterers, we fail to see why an officer's "reasonable belief" is not an equally "neutral" limitation on the power to order loiterers

[5] A law granting the police unfettered discretion to order persons around, of course, would fail under the second prong of vagueness doctrine because it would permit arbitrary and discriminatory enforcement. That is the only point made by the dicta in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91 & n.5 (1965), on which the Youkhana respondents so heavily rely. See Youkhana Br. 7.

to move on. In fact, requiring loiterers to move on is surely a lesser infringement on their liberty than authorizing their detention.

The Morales respondents add that our ordinance is arbitrary and discriminatory because it imposes sanctions triggered by an individual's association with a criminal street gang. See Morales Br. 14-15. In fact, government may make an individual's status an element of a criminal offense when it has a reasonable basis for doing so, even if it could not constitutionally impose punishment based on status alone. No case makes this clearer than *Lewis v. United States*, 445 U.S. 55 (1980), in which the Court upheld a statute prohibiting all convicted felons from possessing firearms, even if their convictions were uncounseled and hence unconstitutionally obtained, since there was a rational basis to deny all convicted persons access to firearms. See *id.* at 65-68. Here, even respondents do not dispute that the legislature had a rational basis to believe that loitering by groups containing criminal street gang members posed special dangers. Requiring such groups to move along when ordered is anything but arbitrary and discriminatory—in light of the City Council's findings it was plainly rational to limit this group's freedom to loiter, just as "Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness was rational." *Id.* at 67 (footnote omitted).

4. Defending the substantive due process holding of the Illinois Supreme Court, respondents do not claim that the gang loitering ordinance infringes any fundamental right and therefore requires strict judicial scrutiny, but rather concede that it requires only a rational basis. See Morales Br. 15-16; Youkhana Br. 17. Surely the legislature could rationally conclude that this modest infringement of liberty interests accomplished by requiring loiterers to obey police orders to move on is justified by the need to combat the

evils engendered by gang loitering—an interest respondents notably do not claim to be illegitimate. And if the legislature's judgment was at least rational, we do not see why the rubric of substantive due process grants courts authority to overturn it.

5. Even respondents do not question that the tide has properly turned in favor of proactive and community-oriented policing strategies including public order laws, nor do they deny that the threat of liability created by the unsettled state of the law poses potent inhibitions to state and local governments considering such laws. Decreasing the uncertainty now rife in this area of the law is surely reason enough to grant plenary review. Upholding this ordinance because it prohibits disobedience to a police order given under a "reasonable belief" standard derived from *Terry* would provide state and local governments with urgently needed guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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